

**(1973) 03 MAD CK 0006**

**In the Madras High Court**

**Case No :** Tax Case No. 102 of 1967 (Reference No. 74 of 1967)

K.R.S. Gurumurthy Pathar (by L.R.)

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision :** 13-03-1973

**Acts Referred:**

Income Tax Act, 1922 — Section 28(1)

**Citation :** (1974) 96 ITR 404

**Hon'ble Judges :** V. Ramaswami, J;G. Ramanujam, J

**Bench :** Division Bench

**Advocate :** K. Srinivasan and K.C. Rajappa, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

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## **Judgement**

Ramanujam, J.—The following question has been referred to us for decision at the instance of the assessee:

Whether, on the facts and in the circumstances of the case, the levy of penalty of Rs. 2,500 on the assessee u/s 28(1)(c) of the Income Tax Act, 1922, is justified in law ?

The assessee is a goldsmith by profession. He has also started a business in diamonds on March 7, 1958. On 24th February, 1959, the assessee

and his brother went to Karur on business. At that time, the Central Excise authorities seized from them diamonds, jewellery and other precious

stones amounting to 36 carats and 90 cents, the value of which came to Rs. 26,800. Before the Central Excise authorities the assessee contended

that diamonds weighing 5.57 carats represented a consignment received from H.B. Shah, that jewellery weighing 7.38 carats represented the

consignment received from one Alagappa Chettiar, and that diamonds weighing 19.50 carats had been inherited from his father. The Central

Excise authorities accepted the plea of the assessee and returned the goods seized to the assessee on January 7, 1961, The assessee had also

purchased a house property on September 23, 1958, for Rs. 6,420.

2. The assessee filed a return of income for the previous year ending March 31, 1959, showing an income of Rs. 3,424 both in respect of his

profession as goldsmith and as a dealer in diamonds. The Income Tax Officer was, however, not inclined to accept the return. He called upon the

assessee to prove his source for the purchase of the house property for Rs. 6,420 and also for acquiring the diamonds weighing 19.50 carats and

valued at Rs. 16,187. The assessee explained that both the house property worth Rs. 6,420 as well as the diamonds worth about Rs. 16,187 did

not belong to him individually, but that those had been acquired from out of the joint family funds left by his father, who died on November 27,

1954, and that as such they belonged to the joint family of himself and his two brothers. In support of this explanation, the assessee relied on the

affidavits from his two brothers, which were to the effect that the house and the diamonds had been acquired out of the joint family funds. The

Income Tax Officer, however, held that the house as well as the diamonds had been acquired by the assessee in his individual capacity and that the

said acquisitions must have been out of extraneous and undisclosed cash available with the assessee outside his books. In his view, he not only

included the above two sums of Rs. 6,420 and Rs. 16,187 in the assessee's income, but also initiated proceedings for the levy of penalty. The

Income Tax Officer held that it was a clear case of concealment. In that view, he levied a penalty of Rs. 2,500.

3. Against the order levying penalty, there was an appeal to the Appellate Assistant Commissioner. Even there, it was contended that the house

property as well as the diamonds in question belonged to the joint family of himself and his two brothers, that they had not been acquired by him

exclusively out of his own funds and that, therefore, the levy of penalty on the basis that there was deliberate concealment could not be sustained.

Before the Appellate Assistant Commissioner a partition deed executed between the assessee and his two brothers on 27th November, 1960, was

produced in support of the assessee's case that the house property as well as the diamonds belonged to the joint family and that they were the

subject-matter of the said deed of partition. The assessee also relied on the affidavits filed by his two brothers dated 14th August, 1960, wherein

they had solemnly declared that the properties in question were joint family properties and not the exclusive properties of the assessee. The

Appellate Assistant Commissioner, however, took the view that the partition deed as well as the affidavits had come into existence after the

assessment proceedings had commenced and that, therefore, they could not have any evidentiary value. He, therefore, justified the penalty order.

4. There was a further appeal to the Tribunal. The Tribunal also confirmed the levy of penalty. Before the Tribunal it was contended by the

assessee that the diamonds in question were old-cut diamonds and as such they could not have been acquired by the assessee in the recent past

and that the nature of the diamonds supported his version that it belonged to the Hindu undivided family having been inherited from their father. The

assessee also relied upon the affidavits of his two brothers and the partition deed dated 27th November, 1960, in support of his plea that the house

property as well as the diamonds in question had been acquired with the funds of the joint family and not with his own separate funds. The

Tribunal, without much discussion on the question as to whether the house property and the diamonds belonged to the joint family or not as

contended by the assessee, straightaway proceeded to say that "it has been proved almost to a certainty that the assessee's father could not have

left any diamonds". What are the materials on which the Tribunal took it as certain that the assessee's father could not have acquired the diamonds

is not clear. The assessee's statement that the diamonds were old-cut ones has not been disputed by the revenue. That the assessee and his two

brothers constituted a Hindu joint family has also not been questioned. Once the assessee is treated as a member of the Hindu joint family, then the

onus is on the revenue to show that the acquisition of the house property as well as the diamonds was from his exclusive funds, especially when the

recitals in the partition deed show that there was some nucleus of the joint family, the income from which could have been utilised for the purchase

of the house. As a matter of fact, the revenue has not questioned the genuineness of the partition deed. It has not been shown that it is a sham and

nominal document. The only ground on which the partition deed has been ignored is that it has come into existence after the assessment

proceedings have been commenced. We are not in a position to agree with the Tribunal that merely because the partition deed has come into

existence after the assessment proceedings have commenced, the document cannot be said to have no evidentiary value. It is pertinent to note that,

if the affidavits filed by the two brothers of the assessee and the recitals in the partition deed are taken to be correct, then the two items of

properties are clearly those of the joint family. The Tribunal has not referred to any material from which it could be inferred that the items had been

acquired by the assessee from and out of his separate funds. The assessee would not have given up a share in the diamonds and the house to his

brothers, if really they had been acquired by the assessee. We are, therefore, of the view that, apart from the question of onus, the materials on

record clearly disclose that the house property as well as the diamonds should have been inherited by the assessee and his two brothers from their

father and that they are not the separate properties of the assessee.

5. The Tribunal has given one more reason for holding that the diamonds should have been acquired by the assessee. It says that if really y the

family had owned the diamonds, the assessee would have brought the same into his books when he started the business on March 7, 1958. But

the Tribunal overlooks an obvious fact in drawing an adverse inference for not bringing the diamonds into the assessee's books of account. The

business started by the assessee on March 7, 1961, is his exclusive business in diamonds and not a joint family one. If the diamonds had been left

by his father and all the sons had inherited the same, the assessee cannot bring the diamonds into his books of account treating the diamonds as

exclusively his. In any view of the matter, we are not in a position to agree with the conclusion arrived at by the Tribunal in this case. Therefore, the

penalty levied in this case cannot be justified. The result is that the question is answered in the negative and against the revenue. The assessee will

have his costs. Counsel's fee Rs. 250.